

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

11/14/1985
30348

FILE:

B-218042

DATE: February 1, 1985

MATTER OF:

Tri-State Laundry Services, Inc.
d/b/a Holzberg's Launderers and
Cleaners

DIGEST:

1. The new Federal Acquisition Regulation, in accord with the final revisions of the now-superseded Federal Procurement Regulations, prohibits the government from considering prompt payment discounts when evaluating bids. Thus, a protester cannot successfully argue either that it had no knowledge of this prohibition, or that the agency would be acting properly in now accepting its offered discount, since publication of the regulatory provision in the Federal Register has placed the contracting community on at least constructive notice of its existence.
2. When a solicitation expressly cautions bidders against relying upon oral advice from agency personnel, bidders who ignore the admonition and rely upon advice which later proves to be erroneous must suffer the consequences. Even if the protester was misled to its detriment, such erroneous advice neither binds the agency nor requires the submission of new bids.

Tri-State Laundry Services, Inc. d/b/a/ Holzberg's Launderers and Cleaners (Tri-State) protests the award of a contract for laundry services to The Scrubboard under invitation for bids (IFB) No. IFB-130-002-5, issued by the Department of Justice, Bureau of Prisons. Tri-State complains that it should have received the award because it submitted the low bid when its offer of a prompt payment discount is taken into account. We dismiss the protest.

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Tri-State asserts that it offered the prompt payment discount in reliance upon oral advice from a member of the contracting officer's staff that the agency would consider a 20-day discount period in evaluating bids. After bid opening, Tri-State was informed by the agency that the discount was not considered in evaluating the firm's bid because of a current regulatory prohibition, and the bid without the discount was not low. Tri-State urges that the agency is bound by the representation of its employee and that it is therefore entitled to the award as the low bidder. In the alternative, Tri-State urges that the procurement should be recompleted.

Formerly, the government's evaluation of bids included consideration of prompt payment discounts on the assumption that such discounts would be taken. See Federal Procurement Regulations (FPR), 41 C.F.R. § 1-2.407-3 (1982). However, the consideration of discounts was expressly prohibited by FPR amendment 223, September 20, 1982, although discounts themselves could still be offered and accepted so as to become part of the award and thus binding on the contractor. See FPR, 41 C.F.R. § 1-2.407-3 (1984).

The FPR has since been superseded by the Federal Acquisition Regulation (FAR) (effective April 1, 1984), which contains the same prohibition against the government's consideration of prompt payment discounts. FAR, § 14.407-3, 48 Fed. Reg. 42,102, 42,182 (1983) (to be codified at 48 C.F.R. § 14.407-3), provides:

"Prompt payment discounts shall not be considered in the evaluation of bids. However, any discount offered will form a part of the award, and will be taken. . . if payment is made within the discount period specified by the bidder. . . ."

Thus, it is clear that the oral advice from the contracting office to Tri-State was erroneous.

In view of the fact that discounts can still be offered and taken, although they can no longer be used for the evaluation of bids, FAR, § 32.111(c)(1), 48 Fed. Reg. 42,102, 42,330 (1983) (to be codified at 48 C.F.R. § 32.111(c)(1)), provides that the following clause shall

be inserted in solicitations and contracts when a fixed-price supply or fixed-price service contract is contemplated:

"DISCOUNTS FOR PROMPT PAYMENT (APR 1984)

In connection with any discount offered for prompt payment, time shall be computed from (1) the date of completion of performance of the services or delivery of the supplies to the carrier if acceptance is at point of origin, or date of delivery at destination or port of embarkation if delivery and acceptance are at either of these points, or (2) the date the correct invoice or voucher is received in the office specified by the Government, if the latter is later than date of performance or delivery. For the purpose of computing the discount earned, payment shall be considered to have been made on the date the Government check was mailed."^{1/}

The IFB in question contained this clause, and Tri-State implies that its presence in the solicitation, along with the oral advice from the contracting offices reasonably led it into offering a discount with the expectation that it would be considered during bid evaluation. Tri-State specifically asserts that the agency is bound by the oral representation made by its employee, and thus must consider the firm's offered discount so as to make it the low bidder. We disagree.

The "Discount for Prompt Payment" clause, which Tri-State cites in support of its position, simply did not provide that prompt payment discounts would be considered in evaluating bids. Further, although the express prohibition against consideration of discounts

^{1/}This clause is specifically set forth at FAR, § 52.232-8, 48 Fed. Reg. 42,102, 42,554 (1983) (to be codified at 48 C.F.R. § 52.232-8).

in FAR, § 14.407-3, supra, was not contained in the IFB, there is no doubt but that publication of this regulatory provision in the Federal Register has put the contracting community on at least constructive notice of its existence. See Western Filament, Inc., B-192148, Sept. 25, 1978, 78-2 CPD ¶ 226. Therefore, Tri-State cannot successfully argue either that it had no knowledge of the prohibition, or that the agency could properly consider the firm's discount.

Tri-State asserts that it relied upon the oral advice of the agency's employee to its detriment. We assume, however, that the IFB contained the following provision, which is required by FAR, § 14.201-6(c)(2), 48 Fed. Reg. 42,102, 42,172 (1983) (to be codified at 48 C.F.R. § 14.201-6(c)(2)), to be inserted in all invitations for bids (except those for construction that is not estimated to exceed \$10,000):

"EXPLANATION TO PROSPECTIVE BIDDERS (APR 1984)

Any prospective bidder desiring an explanation or interpretation of the solicitation, drawings, specifications, etc., must request it in writing soon enough to allow a reply to reach all prospective bidders before the submission of their bids. Oral explanations or instructions given before the award of a contract will not be binding. . ."^{2/}

In this regard, we have held that where a solicitation provision clearly puts bidders on notice not to rely upon the oral representations of agency personnel, Ace Van & Storage Co., B-213915, July 16, 1984, 34-2 CPD ¶ 47, the bidder must suffer the consequences of its reliance upon such advice. Jensen Corp., 60 Comp. Gen. 543 (1981), 81-1 CPD ¶ 524. Therefore, even if the agency's employee here misled Tri-State to its harm, that erroneous advice neither binds the government now to

^{2/}This clause is specifically set forth at FAR, § 52.214-6, 48 Fed. Reg. 42,102, 42,498 (1983) (to be codified at 48 C.F.R. § 52.214-6).

consider the discount and thus to award the firm the contract, nor requires the procurement to be recompeted. Ace Van & Storage Co., supra.

Under GAO's new Bid Protest Regulations (effective January 15, 1985), this office will summarily dismiss a protest without requiring the submission of an agency report when the protest on its face does not state a valid basis for protest. See GAO Bid Protest Regulations, § 21.3(f), 49 Fed. Reg. 49,417, 49,421 (1984) (to be codified at 4 C.F.R. § 21.3(f)). We fail to find a valid basis for protest here, and, accordingly, we have not requested a report from the Bureau of Prisons.

The protest is dismissed.

A handwritten signature in cursive script, reading "Ronald Berger".

for the Comptroller General
of the United States